

GOVERNMENT IN THE SUNSHINE: OPEN MEETING LEGISLATION IN OHIO

JAMES B. RECCHIE*
JOHN J. CHERNOSKI**

The general availability of government information is the foundation upon which popular sovereignty and consent of the governed rest. The founding fathers clearly recognized the importance of an informed public to the maintenance of freedom.¹ Yet through most of our history a government open to the people remained little more than a hollow precept. Although it has been contended that the Constitution grants a right of access to government meetings,² neither the Constitution nor the common law expressly recognizes a legal right of citizens to examine and investigate the affairs of government.³

The concept of a government open to the people, however sound in theory, is not easily translated into a legal right. The right of the public to know must be tempered by legitimate governmental interests in protecting the confidentiality of certain information. Thus it is necessary to strike an often difficult balance between these competing claims. The desire of the public to gather information must be satisfied with consideration for the way in which governments conduct their affairs and, therefore, an awareness of the practical limitations that open government imposes.

The Ohio General Assembly, in enacting what is popularly known as the "Sunshine Law,"⁴ has sought to formulate standards by which to balance these competing interests. The statute has conferred upon the public a broad and enforceable right of access to the operation of governmental bodies. It has placed upon public officials corresponding duties and restrictions of an exacting nature. The rigors of the statute are exacerbated by the uncertainty of its application. This article will attempt to explain the effect and operation of

* Assistant Attorney General, State of Ohio

** Member, Ohio State Law Journal

¹ A popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

Letter from James Madison to W. T. Barry, Aug. 4, 1822, in 9 MADISON WRITINGS 103 (G. Hunt ed. 1900-1910).

² See, e.g., Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1 (1957); Note, *Access to Official Information: A Neglected Constitutional Right*, 27 IND. L.J. 209 (1952).

³ See H. CROSS, *THE PEOPLE'S RIGHT TO KNOW* 179-94 (1953).

⁴ OHIO REV. CODE ANN. § 121.22 (Page Supp. 1976).

Ohio's open meeting statute and its impact upon Ohio's bodies of state and local government.

I. FORMER LAW AND RECENT AMENDMENTS

Most states have adopted open meeting laws.⁵ Although Ohio has had an open meeting statute since 1953,⁶ it was quite limited in scope prior to recent amendments. Under former law all meetings of any board, commission, agency, or authority of the state or any of its political subdivisions had to be open to the public at all times. Specifically excepted from the requirement of openness were hearings of the pardon and parole commission conducted at a penal institution.⁷ The law also provided that no formal action⁸ of any kind could be adopted at an executive session.⁹

The Ohio Supreme Court, however, held that the provisions referring to executive sessions provided an exception to the general

⁵ ALA. CODE tit. 14, § 393 (1958); ALASKA STAT. § 44.62.310 (1962); ARIZ. REV. STAT. ANN. § 38-431.01 (1974); ARK. STAT. ANN. § 6-604 (Supp. 1973); CAL. GOV'T CODE § 54950-60 (West Supp. 1975); COLO. REV. STAT. ANN. § 3-19-1 (1963); CONN. GEN. STAT. ANN. § 1-21 (Supp. 1974-75); FLA. STAT. ANN. § 236.011 (1975); GA. CODE ANN. § 23-802 (1971); HAWAII REV. STAT. § 92-2 (1968); IDAHO CODE § 67-2342 (Supp. 1974); ILL. ANN. STAT. ch. 102, § 42 (Smith-Hurd Supp. 1975); IND. ANN. STAT. § 5-14-1-4 (Burns 1974); IOWA CODE ANN. § 28 A.2 (Supp. 1975-76); KAN. STAT. ANN. § 75-4318 (Supp. 1975); KY. REV. STAT. ANN. § 61.810 (1975); LA. REV. STAT. ANN. § 42:5 (1976); ME. REV. STAT. ANN. tit. I, § 403 (1975); MD. ANN. CODE art. 25, § 5 (Supp. 1975), art. 41, § 41 (1957), art. 23A, § 8 (Supp. 1975); MASS. GEN. LAWS ANN. ch. 30A, § 11A, ch. 34.9(f), ch. 39, §§ 23(A)-(C) (1973); MICH. COMP. LAWS ANN. § 15.251-253 (Supp. 1975); MINN. STAT. ANN. § 471.705 (Supp. 1976); MO. ANN. STAT. § 610.015 (Vernon Supp. 1976); NEB. REV. STAT. § 84-1401 (1971); NEV. REV. STAT. §§ 241.020, 244.080, 268.305 (1971); N.H. REV. STAT. ANN. § 91-A:2 (Supp. 1975); N.J. STAT. ANN. § 10:4-3 (Supp. 1975-76); N.M. STAT. ANN. § 5-6-17 (1974); N.C. GEN. STAT. § 143-318.2 (1975); N.D. CENT. CODE § 44-04-19 (1960); OKLA. STAT. ANN. tit. 25, § 201-02 (Supp. 1975-76); ORE. REV. STAT. § 192.630 (Supp. 1973); PA. STAT. ANN. tit. 65, § 252 (1959); S.C. CODE ANN. § 1-20.3 (Supp. 1975); S.D. COMPILED LAWS ANN. § 1-25-1 (1974); TEX. REV. CIV. STAT. ANN. art. 6252-17(2) (Supp. 1975-76); UTAH CODE ANN. § 52-4-2 (1970); VT. STAT. ANN. tit. 1, § 312 (Supp. 1975); VA. CODE ANN. § 2.1-343 (Supp. 1975); WASH. REV. CODE ANN. § 42.30.030 (1972); WIS. STAT. ANN. § 66.77 (Supp. 1975-76); WYO. STAT. ANN. § 9-692.12 (Supp. 1975).

⁶ Act of July 6, 1953, 125 Laws of Ohio 534.

⁷ *Id.*

⁸ The Ohio Supreme Court defined "formal action" as follows:

This means that at any session of a board or commission subject to the ordinance or the statute, where any action is taken, which action is required by law, rule or regulation to be recorded in the minutes, the journal or any other official record of the board or commission, such session is a meeting which must be open to the public.

Beacon Journal Publishing Co. v. City of Akron, 3 Ohio St. 2d 191, 199, 209 N.E.2d 399 (1965).

⁹ The Trumbull County Court of Appeals has stated that "[a]n executive session . . . is . . . one from which the public is excluded and at which only such selected persons as the board may invite are permitted to be present." *Thomas v. Board of Trustees*, 5 Ohio App. 2d 265, 215 N.E.2d 434 (syllabus) (Ct. App. 1966).

requirement that all meetings of public bodies be open to the public.¹⁰ Under this restrictive interpretation the statute permitted a public body to conduct official business in executive session if its members so desired and if the meeting did not involve the adoption or passage of a resolution, rule, regulation, or other formal action. So interpreted, the statute lacked meaning and vitality, and represented little more than a philosophical commitment to the principle of open government. Lively and full deliberation could be conducted behind closed doors; as long as any formal action was taken, however perfunctorily, in an open meeting, the terms of the statute were satisfied.¹¹

Recent amendments to Ohio's open meeting statute have fundamentally changed the manner in which state and local governmental bodies must conduct their affairs.¹² The obvious purpose of the amendments is to afford all members of the public the maximum opportunity, consistent with the protection of the public and of innocent persons, to observe the full operation of government. With this end in mind, the General Assembly has expressly stated that the terms of the statute shall be liberally construed to require public officials to take official action and conduct all deliberations upon official business in open meetings.¹³ Accordingly, any doubt that may arise as to the application of the statute should be resolved in favor of openness.¹⁴

¹⁰ *Beacon Journal Publishing Co. v. City of Akron*, 3 Ohio St. 2d 191, 209 N.E.2d 399 (1965).

¹¹ Such a procedure is exemplified by a former practice of the City Council of Massillon, Ohio. The meetings of council were described as opening with a pledge of allegiance to the flag and then the members of the council [would] retire for a caucus which . . . [was] closed to the press and public. After an hour or two the members . . . [would] return to the public meeting room and vote approval or rejection on the issues they [had] discussed behind closed doors.

Letter from Robert H. Giles, Executive Editor of the *Akron Beacon Journal*, to State Senator David Headley, Chairman of the Senate Judiciary Committee, February 19, 1975.

¹² Am. Sub. S. B. 74, 111th General Assembly (Eff. 11-28-1975).

¹³ OHIO REV. CODE ANN. § 121.22(A) (Page Supp. 1976).

¹⁴ The Ohio Supreme Court has recently indicated, in the case of *Dayton Newspapers, Inc. v. City of Dayton*, 45 Ohio St. 2d 107, 110, 341 N.E.2d 576, 578 (1976), that it will assume a similar approach in favor of disclosing public records:

[D]oubt should be resolved in favor of disclosure of records held by governmental units. Aside from the exceptions mentioned in R.C. 149.43, records should be available to the public *unless* the custodian of such records can show a legal prohibition to disclosure. Cf. R.C. 121.22(A), as amended November 28, 1975.

II. SCOPE OF THE SUNSHINE LAW

A. *Public Bodies Governed by the Statute*

1. The Terms of the Statute

The law requires that any meeting of a public body shall be open to the public at all times.¹⁵ As applied to state government, a public body is "any board, commission, committee or similar decision-making body of a state agency, institution or authority"¹⁶ Thus the statute covers every facet of collective decision making by a state entity. As under former law, however, meetings held between an individual public officer and his staff or other individuals do not fall within the scope of the statute.

Certain entities that would otherwise qualify as public bodies under the statute are specifically excepted from its operation. The exceptions appear to be based upon a determination that the business conducted by these bodies is such that the interests served by maintaining secrecy are more important than those promoted by informing the public. Thus the amended statute retains exceptions for grand juries¹⁷ and for certain meetings of the Adult Parole Authority.¹⁸ Also, the Ohio Development Financing Commission, which assists industrial, commercial, research, and distribution activities within the state, may, by unanimous consent of all members present, hold a closed meeting when considering certain information.¹⁹

Although administrative bodies that perform an adjudicatory function are included within the terms of the statute, the judiciary is not. A court cannot properly be regarded as a "board, commission, committee or *similar* decision-making body." Moreover, since most judicial proceedings are open to the public, little would be achieved by construing the statute to include the judiciary. Several state legislatures, in enacting similar statutes,²⁰ have specifically excepted the judiciary from the openness requirement. The failure of the Ohio General Assembly to do so, however, is not of particular significance. No state legislature has included the judiciary within the scope of open meeting legislation, and no court has interpreted one of these statutes to include the judiciary. Thus it would be unreasonable to read such a provision into the statute.

¹⁵ OHIO REV. CODE ANN. § 121.22(C) (Page Supp. 1976).

¹⁶ *Id.* § 121.22(B)(1).

¹⁷ *Id.* § 121.22(D).

¹⁸ *Id.*

¹⁹ *Id.* § 121.22(E).

²⁰ See, e.g., N.J. STAT. ANN. § 10:4-4(e) (Supp. 1975); WASH. REV. CODE ANN. § 42.30.030(1)(a) (1972).

Neither is the General Assembly expressly covered by the terms of the statute. Rules of statutory construction would prevent any interpretation which would so extend it. It is significant that the statute specifically applies to the "legislative authority . . . of any county, township, municipal corporation, school district, or other political subdivision or local public institution."²¹ The fact that the "legislative authority" is mentioned with respect to political subdivisions indicates that the General Assembly did not intend to include itself—the legislative authority of the state—within the definition of a public body. Finally, the constitution of Ohio generally requires that the proceedings of the legislature shall be open and further provides the circumstances under which they may be closed.²²

Beyond these relatively clear examples, however, the scope of the statute is extremely uncertain. Unlike some statutes that precisely define the type of public body to be covered—*e.g.*, bodies established by law to serve a public purpose,²³ or bodies which receive or expend tax revenues²⁴—the Ohio statute provides no general standard by which to determine whether a particular entity is bound by the openness requirement. The only guidance given by the General Assembly is an enumeration of several broad types of public body each of which is open to substantial interpretation.

The most intractable problem of coverage is whether the statute applies to a governmental body's subordinate agencies or committees, the only function of which is to make recommendations to the parent organization. Because the definition of "public body" is not expressly limited to entities created by statute, it is quite possible for the term to be interpreted as including such entities. The inclusion of the term "committee" among the enumerated units would seem to support the conclusion that advisory groups are subject to the provisions of the statute. On the other hand, the phrase "or similar *decision-making* body" casts this interpretation in some doubt.

In theory, the need to open the meetings of these advisory bodies to the public is less compelling since their recommendations are normally considered in open session by the parent body. There are, however, certain subordinate bodies which in fact, if not in law, do far more than advise their parent bodies. Certain committees of state universities, for instance, that are formally designated advisory groups, often govern the university in effect. Surely it is not uncommon for a university board of trustees, entrusted with the very com-

²¹ OHIO REV. CODE ANN. § 121.22(B)(1) (Page Supp. 1976).

²² OHIO CONST. art. II, § 13.

²³ HAWAII REV. LAWS § 92-2 (1968).

²⁴ ILL. ANN. STAT. ch. 102, § 42 (Supp. 1975); LA. REV. STAT. § 42.5 (1965).

plex task of governing a state institution, to routinely adopt the recommendations of a subcommittee with little or no deliberation. Although such groups are not, in the strict sense, decision-making bodies, they are certainly comprehended within the open meeting philosophy.

Courts in jurisdictions having open meeting statutes similar to Ohio's have held that subcommittees are subject to the same openness requirements as their parent bodies. Thus it has been held that open meeting statutes apply to meetings of a citizens' planning committee which is appointed by a town council,²⁵ and to a committee comprised of the dean and faculty of the law school of a state university²⁶ and to all committee meetings of a state university board of trustees.²⁷ When a California court held that a city planning commission, the only function of which was to make recommendations to city council, did not fall within the scope of California's open meeting law,²⁸ the statute was amended to include official advisory commissions.²⁹

The inclusion of such committees within the scope of the statute would certainly seem to be in keeping with the spirit of the law. The statute's introductory provision states that the section "shall be liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings."³⁰ The scope of "deliberations" is much broader than the formal act of decision making; and by this language the legislature apparently intended to affect the entire decision-making process. Committee meetings, at the very least, represent a stage in the decision-making process. They can provide an easy means of completely circumventing the statutory coverage. One purpose of open meeting laws is to "prevent at non-public meetings the crystallization of secret decisions to a point just short of ceremonial acceptance."³¹ If the law is construed to except advisory committees, covert deliberations followed by pro forma ratification might well become commonplace.

Yet a different aspect of the statute's introductory provision might well have a limiting effect on the statute's application. Although it has been stated that the word "officer"³² is a term of vague

²⁵ *Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974).

²⁶ *Cathcart v. Andersen*, 10 Wash. App. 429, 517 P.2d 980 (Ct. App. 1974).

²⁷ *Arkansas Gazette Co. v. Pickens*, 258 Ark. 69, 522 S.W.2d 350 (1975).

²⁸ *Adler v. City Council*, 184 Cal. App. 2d 763, 7 Cal. Rptr. 805 (Dist. Ct. App. 1960).

²⁹ CAL. GOV'T CODE § 54952.3 (Supp. 1975).

³⁰ OHIO REV. CODE ANN. § 121.22(A) (Page Supp. 1976).

³¹ *Palm Beach v. Gradison*, 296 So. 2d 473, 477 (Fla. 1974).

³² OHIO REV. CODE ANN. § 121.22(A) (Page Supp. 1976).

and variable import, the meaning of which may depend upon the circumstances under which it is used,³³ the term connotes certain basic characteristics. Thus it has been held that a public office is a charge or trust conferred by public authority for a public purpose, with independent and continuing duties involving in their performance the exercise of some portion of the sovereign power.³⁴ This definition would except many committees, most of which are comprised of public employees and private citizens, from the operation of the statute.

On the other hand, the same language can be read to require that a meeting of an advisory group be carried on publicly if it includes among its members any public official. Thus a subcommittee which is comprised of less than a majority of members of the parent body along with other individuals would, on the basis of the introductory provision, be subject to the requirement of openness. In at least one jurisdiction, subcommittee meetings must be conducted in public if the committee is composed of more than one member of the parent group.³⁵

2. The Constitutional "Home-Rule Exception"

Another uncertainty in the scope of the open meeting statute is the possible home-rule exception. Article XVIII, section 7 of the Ohio constitution allows any municipality to frame, adopt, and amend a charter for its government. This power is subject to article XVIII, section 3 of the constitution, which provides:

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with general law.

In *State ex rel. Canada v. Phillips*³⁶ the Supreme Court of Ohio construed the words "as are not in conflict with general law" to modify the phrase "local police, sanitary and other similar regulations" but not to modify "powers of local self-government."³⁷ Therefore, a state statute can override a municipal ordinance only in these limited areas.

³³ See *State ex rel. Brand v. Eversman*, 155 Ohio St. 383, 388, 99 N.E.2d 169, 171 (1951).

³⁴ *State ex rel. Herbert v. Ferguson*, 142 Ohio St. 496, 501, 52 N.E.2d 980, 983 (1944); *State ex rel. Bricker v. Gessner*, 129 Ohio St. 290, 293-94, 195 N.E. 63, 65 (1935).

³⁵ *Jones v. Tanzler*, 238 So. 2d 91 (Fla. 1970); *Bigelow v. Howze*, 291 So. 2d 645 (Fla. Ct. App. 1974).

³⁶ 168 Ohio St. 191, 151 N.E.2d 722 (1958).

³⁷ *Id.* at 197, 151 N.E.2d at 727.

In *Beacon Journal Publishing Co. v. City of Akron*,³⁸ the supreme court decided that an open meeting ordinance passed by a home-rule community was not a local police, sanitary, or other similar regulation.³⁹ The court concluded that governmental bodies created by a municipal charter or ordinance were governed by the local open meeting law, while bodies created by state statute were governed by the state regulations.⁴⁰ Thus a charter community can adopt its own ordinance to regulate open meetings of council and other public bodies created by local law despite the Ohio open meeting law.

However, it is not likely that a home-rule community will adopt an open meeting law less restrictive than the state statute. Growing concern about the conduct of public business and abuses in government will likely frustrate any attempt in the political area to shut the doors to the public, except to the extent provided by the state law.

It is also possible that the courts will invalidate such ordinances under the "state-wide concern doctrine."⁴¹ Under this doctrine, state law may control even if the subject matter concerns local government. If the "subject matter affects the general public of the state as a whole more than it does the local inhabitants the matter passes from what was a matter for local government to a matter of general state interest."⁴² The courts may reason that open meetings of public bodies are of such great state interest, affecting citizens throughout Ohio, that local legislation must give way to state law in this area.

B. Meetings and Executive Sessions

1. Meetings

The statute defines a meeting as any prearranged discussion of public business by a majority of the members of a public body.⁴³ The definition is uncompromising in scope. Although chance encounters among members of a public body do not fall within the ambit of the statute, virtually every other form of discourse or interaction among a majority of members could qualify as a meeting. Any social gather-

³⁸ 3 Ohio St. 2d 191, 209 N.E.2d 399 (1965).

³⁹ *Id.* at 195, 209 N.E.2d at 402.

⁴⁰ *Id.* at 196, 209 N.E.2d at 402.

⁴¹ See *Cities & Villages*, January 1976, at 15.

⁴² *Cleveland Elec. Illuminating Co. v. City of Painesville*, 15 Ohio St. 2d 125, 129, 239 N.E.2d 75, 78 (1968). *Painesville* involved intrastate and intercity transmission of high voltage electricity. See also *Canton v. Whitman*, 44 Ohio St. 2d 62, 337 N.E.2d 766 (1975) (doctrine applied in the matter of fluoridation of a city's water supply); *State ex rel. McElroy v. City of Akron*, 173 Ohio St. 189, 181 N.E.2d 26 (1962), *appeal dismissed*, 371 U.S. 35 (1962) (state-wide concern doctrine applied with regard to safety regulations of water craft).

⁴³ OHIO REV. CODE ANN. § 121.22(B)(2) (Page Supp. 1976).

ing or assemblage, no matter how informal or brief, could become a meeting of the public body if it is prearranged and if it includes a majority of members.⁴⁴ Since official business is an inevitable topic of conversation among public officials, full compliance will require the constant exercise of self-restraint on their part.

Because any prearranged "discussion" could qualify as a meeting, the definition extends to conversations by telephone or other electronic equipment that are held simultaneously among members of a public body. Since such discussions must be open to interested individuals, the installation of speaker equipment may be necessary.

The statutory definition of a meeting may effectively extend application of the open meeting law to some public bodies otherwise beyond its scope. For instance, if a subcommittee or an advisory group that is otherwise excluded from coverage includes a majority of the members of a public body, its meetings will be considered meetings of that public body and subject to the full requirement of openness.

Certain entities subject to the open meeting law meet pursuant to statutes which provide that they shall be in continuous session.⁴⁵ Although such provisions may affect the internal administration of the public bodies in question, they should have no bearing upon operation of the open meeting law. Sessions formally designated as "continuous" should be regarded as a series of separate meetings and full compliance with statutory notice provisions required in the case of each such meeting.

One might question the wisdom of a statutory definition which subjects such a broad range of human interaction to the full requirement of openness. A strong argument can be made that public officials should not be barred from discussing any aspect of public business among themselves beyond the rigid confines of a formal open meeting;⁴⁶ the consequent loss of freedom and spontaneity may impair the ability of officials to efficiently dispose of public business. The clarity of the definition, however, gives little countenance to

⁴⁴ *But see* State *ex rel.* Walsh v. Board of County Commissioners, No. 75-M-697 (C.P. Geauga Cty. 1976). The court refused to accept the relator's argument that the commissioners' "informal" conference with a state senator to discuss the creation of an additional common pleas seat was within the definition of "meeting" in the open meeting statute. The commissioners had been attending a convention and had a "spur of the moment" meeting with their state senator to discuss the issue. The court reasoned that the gathering was not prearranged and therefore not covered by the statute.

⁴⁵ *See, e.g.,* OHIO REV. CODE ANN. § 4120.10 (Page 1973); OHIO REV. CODE ANN. § 4703.11 (Page 1973).

⁴⁶ *See* Little & Tompkins, *Open Government Laws: An Insider's View*, 53 N.C.L. REV. 451 (1975).

considerations of efficiency. Public officials must, therefore, operate under a constant awareness of the severe restrictions placed upon them by the open meeting law.

2. The Definition of a Meeting and Freedom of Political Association

Since Ohio's open meeting law applies to any prearranged discussion of public business by a majority of the members of a public body,⁴⁷ prearranged political caucuses of the majority party of a public body must be open to the public.⁴⁸ This requirement may violate the United States Constitution. Membership in a political party is generally protected by the constitutional right of freedom of association,⁴⁹ an "inseparable aspect of 'liberty' assured by the Due Process Clause of the Fourteenth Amendment which embraces freedom of speech."⁵⁰ This right includes the freedom to associate with others for the advancement of political ideas and beliefs.⁵¹ However, political associations are subject to state regulations if a compelling state interest can be shown.⁵²

A three step procedure has been suggested to determine the constitutionality of state regulation of political associations.⁵³ First, it must be determined whether the state's interest in establishing the regulation is legitimate.⁵⁴ The purpose of the open meeting law—to require that deliberations and decisions about public business be done in public view—is clearly a legitimate interest, promoting honesty in government and participation by the citizenry.

Second, if the interests of the state are legitimate, then it must be decided "whether they are 'compelling' or 'substantial' when weighed against the infringement of associational freedoms that they cause."⁵⁵ In *United Public Workers v. Mitchell*,⁵⁶ the United States Supreme Court upheld the prohibition of all political activities by federal civil service employees, finding that the federal government

⁴⁷ OHIO REV. CODE ANN. § 121.22(B)(2) (Page Supp. 1976).

⁴⁸ This would not apply to party caucuses of the Ohio General Assembly. See text accompanying notes 21-22 *supra*.

⁴⁹ See Note, *Freedom of Association and the Selection of Delegates to National Political Conventions*, 56 Cornell L. Rev. 148, 157 (1970) [hereinafter cited as Note, *Freedom of Association*].

⁵⁰ NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

⁵¹ *Id.*

⁵² See Note, *Freedom of Association*, *supra* note 49, at 157-58.

⁵³ *Id.* at 158.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ 330 U.S. 75 (1947).

had a substantial interest in maintaining an "efficient" nonpartisan bureaucracy in spite of the infringement on freedom of association. As compared to the interests of the federal government in *Mitchell*, it would seem that the state government has a greater interest in opening the doors of government to the public.

The final question is whether the state's interests can be substantially served by regulations which are less restrictive to the freedom of political association.⁵⁷ Under the Ohio law this freedom is infringed only in a very limited manner: party caucuses are required to be open only when the members make up the *majority* of a particular public body, and come together at a prearranged time to discuss *public business*. If such caucuses were not required to be open, the right of political association would allow a majority of the members of a public body, who happen to be members of the same political party, to exercise their right of association to thwart the public's right to know.

A bill introduced in the General Assembly in 1976 would specifically exempt political caucuses from the open meeting law.⁵⁸ The result of Senate Bill 431 could be to effectively repeal the open meeting law in relation to those legislative bodies to which it presently applies. In caucus, the party members could discuss and decide an issue, and then in the public meeting could merely formalize the action taken in the caucus. Thus past abuses of the executive session would reappear.

3. Executive Sessions

Even the most rigorous supporters of open meeting legislation recognize the legitimate interest that a government may have in maintaining the confidentiality of certain information. The premature disclosure of information concerning sensitive matters may substantially harm individuals and operate to the detriment of the public welfare. In an attempt to reach a statutory equilibrium between the public's desire for access and the government's need for secrecy, Ohio's recently amended open meeting law authorizes executive sessions in several well defined instances.⁵⁹ In addition to limiting the matters that may be considered in executive sessions, the statute provides that such a session may be held only at a regular or special meeting;⁶⁰ thus an executive session does not suspend operation of

⁵⁷ See Note, *Freedom of Association*, *supra* note 49, at 158.

⁵⁸ S.B. 431, 111th General Assembly (1976).

⁵⁹ OHIO REV. CODE ANN. § 121.22(G) (Page Supp. 1976).

⁶⁰ *Id.*

otherwise applicable notice procedures. Moreover, the session is permissible only for the purpose of "considering" certain information. All final action must be taken publicly.

Personnel and Licensing Matters—A public body may hold an executive session to consider the appointment, employment, dismissal, discipline, promotion, demotion, or compensation of a public employee or official.⁶¹ Also, an executive session may be held in order to investigate charges or complaints against a public official, licensee, or "regulated individual."⁶² If, however, the individual against whom the charges have been brought so requests, a public hearing will be held.

As to licensees, an executive session may be held only in the event of an investigation of *charges or complaints*. At one point the bill provided for executive sessions for the "issuing, suspension or termination of a license."⁶³ This clause was, however, deleted prior to passage. Thus the consideration of information pertinent to the issuance of a license must be carried on publicly.

The provision limits executive sessions to the *investigation* of charges and complaints. The exception is not as broad as it may at first impression appear. The term "investigation" normally means the act of carrying on an inquiry.⁶⁴ Accordingly, once the inquiry ceases and deliberations begin, the meeting must be opened and remain so through final disposition.

The provision authorizing a "public hearing" at the request of an individual against whom charges are brought is troublesome. A hearing generally denotes a proceeding of relative formality that progresses in much the same manner as a trial. It is unlikely, however, that the General Assembly intended to create a right to a hearing that does not otherwise exist. It would be unreasonable to construe such an oblique reference in an amendment to the open meeting law as conferring a new and important right. A public meeting held at the request of the individual would, presumably, constitute a public hearing for purposes of the open meeting law.

The Purchase of Property—The disclosure of certain information considered by a public body would give an unfair competitive or

⁶¹ *Id.* § 121.22(G)(1).

⁶² OHIO REV. CODE ANN. § 121.22(B)(3) (Page Supp. 1976) provides:

"Regulated individual" means: (a) Any student in a state or local public educational institution; (b) Any person who is, voluntarily or involuntarily, an inmate, patient, or resident of a state or local institution because of criminal behavior, mental illness or retardation, disease, disability, age, or other condition requiring custodial care.

⁶³ *House Journal*, July 23, 1975, at 1623.

⁶⁴ BLACK'S LAW DICTIONARY 960 (4th ed. 1957).

bargaining advantage to one whose private interest is adverse to that of the general public. A public body is authorized under such circumstances to consider the purchase of property for public purposes or the sale of property by competitive bidding in executive session.⁶⁵

Although this provision was probably enacted with real estate transactions in mind, it extends to personal property and intangibles as well. Thus the provision would allow a body such as the Retirement Board of the Public Employees Retirement System to meet in executive session for the purpose of reviewing its proposed investment program for the following month.

The term "property" is commonly used to denote everything which has an exchangeable value.⁶⁶ It is arguable that a lease, which has been defined as the purchase of an interest in real property,⁶⁷ may be considered in executive session. But while the concept is quite broad, it is unlikely that it includes services of any sort. The consideration of consulting contracts, for instance, probably must be carried on in public.

The statute further provides that any purchase or sale of public property is void if the seller or buyer of the property received from a member covert information that was not disclosed to the general public in time for other prospective buyers and sellers to prepare and submit offers.⁶⁸ Since such a purchase or sale would be void, the transaction could be set aside in a court action against the public body. The statute does, however, protect subsequent bona fide purchasers, lessees, or transferees who pay for an interest in the property without knowledge of the facts that make the title to the property defective. If the minutes of the public body show that all meetings and deliberations relating to the transaction comply with the provisions of the statute, any instrument executed by the public body disposing of property to a bona fide purchaser is conclusively presumed to have been executed in compliance with the provisions of the open meeting statute.⁶⁹

Attorney-Client Conferences—An executive session is authorized for a public body to confer with its attorney "concerning disputes involving such public body that are the subject of pending or imminent court action."⁷⁰ An action is generally considered pending from its inception until rendition of final judgment.⁷¹ "Imminent" denotes

⁶⁵ OHIO REV. CODE ANN. § 121.22(G)(2) (Page Supp. 1976).

⁶⁶ *Samet v. Farmers' & Merchants' Nat'l Bank*, 247 F. 669, 671 (4th Cir. 1917).

⁶⁷ *Minneker v. Gardiner*, 47 Ohio App. 203, 191 N.E. 793 (Ct. App. 1933).

⁶⁸ OHIO REV. CODE ANN. § 121.22(G)(2) (Page Supp. 1976).

⁶⁹ *Id.*

⁷⁰ *Id.* § 121.22(G)(3).

⁷¹ *See Ex parte Craig*, 274 F. 177, 187 (2d Cir. 1921).

something that is at the point of, rather than in the process of occurring, something that is mediate rather than immediate.⁷² It is apparent that dictionary definitions of the term are unable to provide a workable standard to apply in determining whether an executive session is proper; the propriety of such a session must be left largely to the discretion of the attorney. Although it is probable that the provision authorizes an executive session at the point at which litigation is actually contemplated, the question is one that must be resolved case by case.

Communications between an attorney and his client are normally privileged;⁷³ however discussions in the presence of third parties who are the agents of neither the attorney nor the client are beyond the scope of the privilege.⁷⁴ Thus the General Assembly, in limiting the circumstances in which such a discussion can be held in executive session, has required a partial waiver of the privilege by the client-public body.

Operation of this provision does not pose an ethical problem for attorneys who deal with public agencies, because the privilege clearly belongs to the client.⁷⁵ But since there are certain professional duties that are independent of the rights of clients, it is possible that an open meeting statute could create an ethical dilemma for attorneys. A Florida court has limited the operation of that state's open meeting law⁷⁶ by holding that an attorney has the right and duty to practice his profession in the manner required by the Canon of Ethics, unfettered by conflicting legislation which renders performance of his ethical duties impossible.⁷⁷ In reaching this conclusion, the court perceived a conflict between the statute and the canons as they relate to confidentiality in the handling of pending or anticipated litigation.⁷⁸ Although this precise situation could not arise under the Ohio statute, the Florida case indicates a willingness by courts to defer to the ethical duties of the legal profession when these duties conflict with open meeting legislation.

The California Supreme Court has carved out a full exception to the requirement of openness for consultations between a public body and its attorney.⁷⁹ Presented with the question of whether Cali-

⁷² BLACK'S LAW DICTIONARY 884 (4th ed. 1957).

⁷³ OHIO REV. CODE ANN. § 2317.02 (Page 1974).

⁷⁴ See *Foley v. Poschke*, 137 Ohio St. 593, 31 N.E.2d 845 (1941).

⁷⁵ See *Knepper v. Knepper*, 103 Ohio St. 529, 134 N.E. 476 (1921).

⁷⁶ FLA. STAT. ANN. § 286.011 (1975).

⁷⁷ *Times Publishing Co. v. Williams*, 222 So. 2d 470 (Fla. 1969).

⁷⁸ *Id.* at 475.

⁷⁹ *Sacramento Newspaper Guild v. Sacramento County Bd.*, 263 Cal. 2d 41, 69 Cal. Rptr. 480 (Ct. App. 1968).

fornia's open meeting law⁸⁰ abrogated by implication the statutory policy assuring private legal consultation between a client and his attorney, the court concluded that it was not the intent of the legislature to abolish this privilege.⁸¹ The Ohio statute, unlike California's, specifically mentions and purposely limits the confidentiality of attorney-client discourse; thus it is unlikely that the Ohio courts will construe this provision to allow an executive session to consider information that would otherwise be privileged.

Labor Relations—Meaningful collective bargaining could be seriously hampered if each step of the negotiations had to be taken publicly.⁸² For this reason, a public body is authorized to hold an executive session in order to prepare for, conduct, or review negotiations or bargaining sessions with public employees concerning their compensation or other terms and conditions of their employment.⁸³ The final decision to approve the terms and conditions of employment must, however, be made at a public meeting.

Confidentiality Required by Law—A public body may consider in executive session matters that are "required to be kept confidential by federal law or rules or state statutes."⁸⁴ This provision prevents public disclosure of records that must be kept confidential under federal regulations, such as Medicaid files.⁸⁵ It also prevents the open discussion of information that is generally unavailable to the public under the statutes of the state.⁸⁶

Security Arrangements—An executive session is authorized to consider the "specialized details of security arrangements where disclosure of the matters discussed might reveal information that could be used for the purpose of committing, or avoiding prosecution for a violation of the law."⁸⁷ The term "specialized details of security arrangements" is not defined. The apparent purpose of this provision is to require general principles of public policy relating to crime prevention to be discussed publicly while permitting consideration of specific facts to be carried on behind closed doors if disclosure would thwart the efforts of law enforcement officials.

⁸⁰ CAL. GOV'T CODE § 54953 (West 1966).

⁸¹ *Sacramento Newspaper Guild v. Sacramento County Bd.*, 263 Cal. 2d 41, 58, 69 Cal. Rptr. 480, 492 (Ct. App. 1968).

⁸² See *Bassett v. Braddock*, 262 So. 2d 425 (Fla. 1972).

⁸³ OHIO REV. CODE ANN. § 121.22(G)(4) (Page Supp. 1976).

⁸⁴ *Id.* § 121.22(G)(5).

⁸⁵ 45 C.F.R. 205.50 (1975).

⁸⁶ See, e.g., OHIO REV. CODE ANN. §§ 109.57, 4732.19, 5119.87 (Page Supp. 1976).

⁸⁷ OHIO REV. CODE ANN. § 121.22(G)(6) (Page Supp. 1976).

III. NOTICE REQUIREMENTS

A meeting is open only in theory if the public has no knowledge of the time and place at which it will be held. Accordingly, the open meeting law requires that every public body shall establish, by rule, a reasonable method of notice so that any person may determine the time and place of all regularly scheduled meetings and the time, place, and purpose of all special meetings.⁸⁸

In the case of regular meetings, the precise method of notification is left to the discretion of the public body. Such disparate means as filing a notice with the Secretary of State, posting notice outside the office of the body's executive secretary, or notification by mail could be adopted to satisfy the notice requirements. Whatever method of notification is chosen, however, it must be available to everyone.

In the event of a "special meeting," which is any meeting not regularly scheduled, the statute places additional duties upon a public body. A member of the body is required, at least twenty-four hours before such a meeting is held, to affirmatively notify interested news media of the time, place, and purpose of the special meeting.⁸⁹ Emergency situations are exempted from the requirement of twenty-four hour notice. In the event of "an emergency requiring immediate official action," someone must as soon as possible notify the interested media of the time, place, and purpose of the meeting.⁹⁰

The statute further provides that any person may, upon request and the payment of a reasonable fee, obtain advance notification of all meetings at which any specific type of public business is to be discussed.⁹¹ Advance notification may include, but is not limited to mailing the agenda of meetings to all subscribers on a mailing list or to all who have provided self-addressed, stamped envelopes.⁹² Since this advance notification provision applies to regular and special meetings, it will be necessary for public bodies to plan their agenda in advance. Although the statute does not expressly prohibit the consideration of any new business at a meeting, it is clear that compliance requires some sort of planning on the part of a public body.

Some of the notice provisions relating to special meetings may, under certain circumstances, place an intolerable burden upon the members of a public body. It seems unreasonable in an emergency

⁸⁸ OHIO REV. CODE ANN. § 121.22(F) (Page Supp. 1976).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

situation to require a public official to actually succeed in notifying members of the media before commencing a meeting. The exigencies of the situation may render repeated and varied efforts at notification impossible. In such a case, a good faith effort to comply with the provisions of the statute should be sufficient.

IV. ENFORCEMENT

A mere statutory declaration that meetings are to be held publicly, without an effective means of enforcement, would do little to ensure open government. Thus the law authorizes any person to bring an action in a court of common pleas to enforce the provisions of the open meeting law.⁹³ Upon proof of an actual or threatened violation, the court will issue an injunction to compel the members of the public body to comply.⁹⁴ Injunctive relief is a rigorous means of enforcement; moreover, there is absolutely no limitation with respect to standing, and the injunction is not discretionary with the court.

The statute also provides for penalties against individual members of a public body. Any member who knowingly violates an injunction may be removed from office in an action brought by the prosecuting attorney or the Attorney General.⁹⁵ Although the statute does not specifically so provide, it is possible that an officer who violates the open meeting law could be charged with dereliction of duty as well.⁹⁶ This offense is a misdemeanor of the second degree, punishable by either imprisonment or fine, or both.⁹⁷

A far more wide-reaching provision is that calling for the invalidation of any resolution, rule, or formal action of any kind that is not adopted in an open meeting.⁹⁸ Even if the formal action is taken in an open meeting, it is invalid if it "results from deliberations in a meeting not open to the public."⁹⁹ The statute does not define an open meeting. Reported cases have, however, discussed the various indicia of openness. One Ohio court has defined an "executive session" as one at which the public is excluded;¹⁰⁰ by negative implication, this court would define an open meeting as one at which the public is not excluded, but is permitted to attend. That court noted that the test is not who is present at the meeting of a governmental body, but

⁹³ *Id.* § 121.22(H).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ OHIO REV. CODE ANN. § 2921.44(E) (Page Supp. 1976).

⁹⁷ *Id.*

⁹⁸ OHIO REV. CODE ANN. § 121.22(H) (Page Supp. 1976).

⁹⁹ *Id.*

¹⁰⁰ *Thomas v. Board of Trustees*, 5 Ohio App. 2d 265, 268 (Ct. App. 1966).

whether the meeting is open to those who wish to attend.¹⁰¹ However, another Ohio court has held that a meeting of a board of township trustees that took place at the private residence of the township clerk, without notice to anyone, was not an open meeting even though there was no evidence that anyone was actually excluded.¹⁰² The thrust of the opinion is that one attribute of an open meeting is accessibility, evidenced by its occurrence in a public place. This is in accord with a decision of the Florida Supreme Court that a secret meeting occurs when public officials meet at a time and place to avoid being seen or heard by the public.¹⁰³ Thus the cases do not require a stated invitation to the public; they do, however, require that no actions be taken to exclude the public and that the meeting be held at a place and under circumstances that indicate to the public that it is open.

Openness is not expressly contingent upon full compliance with the public body's self-imposed notice procedure. Although a wanton disregard for the statute's notice provisions would surely result in the invalidation of official action, the effect of an agency's failure to comply fully with its notice procedure is not clear. Courts have generally indicated a reluctance to vitiate otherwise legal actions on the basis of technical defects, and have held in other contexts that substantial compliance with notice provisions is sufficient.¹⁰⁴

Because so few states have open meeting statutes which contain both notice and invalidation provisions, the effect of defective notice in this context has rarely been the subject of litigation. The Supreme Court of Iowa, in passing upon the validity of action taken at a meeting of a board of education which the public was free to attend, but for which no notice was given as required by statute, held that the notice requirement was not jurisdictional and that failure to comply would not result in invalidation.¹⁰⁵ Although the Iowa statute does not provide for the invalidation of actions taken in violation thereof, the case demonstrates the reluctance of courts to apply such a drastic remedy in the absence of a clear legislative requirement to do so. Because Ohio's open meeting statute does not expressly call for the invalidation of action taken at a meeting for which notice requirements were not strictly followed, it seems highly unlikely that the courts would construe the statute as requiring this result.¹⁰⁶

¹⁰¹ *Id.*

¹⁰² *Crist v. True*, 39 Ohio App. 2d 11 (Ct. App. 1973).

¹⁰³ *Miami Beach v. Berns*, 245 So. 2d 38, 41 (Fla. 1971).

¹⁰⁴ *E.g.*, *Jamison Plumbing and Heating Co. v. Rose*, 14 Ohio App. 2d 47, 43 Ohio Op. 2d 136 (Ct. App. 1967); *Nursing Homes v. Public Health Council*, 113 Ohio App. 113 (Ct. App. 1961).

¹⁰⁵ *Dobrovolsky v. Reinhardt*, 173 N.W.2d 837 (Iowa 1970).

¹⁰⁶ *See Lewis v. White*, 287 N.C. 625, 216 S.E.2d 134 (1975).

Perhaps the most fundamental ambiguity presented by the statute is the precise meaning of the term "invalid." The meaning of this word often turns on the context, and courts have held it to mean both void¹⁰⁷ and voidable.¹⁰⁸ If the term means voidable, the action will be invalidated as of the date of judgment; if it means void, the action is invalid *ab initio*.

Courts in other states have voided a licensing tax ordinance¹⁰⁹ and a zoning determination¹¹⁰ which were adopted in closed meetings under older statutes that directed a specific body to meet publicly. Another case¹¹¹ held that a city council assessment for street improvements would be null and void if considered at a meeting held in violation of a general open meeting statute. The Florida Supreme Court¹¹² has stated unequivocally that a mere showing that its Sunshine Law had been violated constitutes an irreparable public injury, and that an ordinance so adopted is void *ab initio*.¹¹³

Other provisions of Ohio's open meeting statute offer little guidance about the meaning of "invalid." The fact that the statute simply provides that formal action is invalid unless adopted at an open meeting, rather than that such action may be declared invalid, indicates that action taken in violation of the statute is void *ab initio*. Furthermore, the provision extending protection to bona fide purchasers of public property¹¹⁴ might be taken as an indication that all other action taken in violation of the statute is void.

There are, however, considerations which support an interpretation of mere voidability. A void act usually denotes an inherent defect, whereas an invalid act simply implies an absence of formality.¹¹⁵ Thus, the word "invalid" will ordinarily be interpreted to mean "irregular" or "voidable," if there has been a failure to comply with formal legal requirements.¹¹⁶ It has been held that when a court renders a judgment on a matter over which it lacks jurisdiction, that judgment is not voidable but completely void;¹¹⁷ but that if jurisdic-

¹⁰⁷ *Kirkbridge v. Hickock*, 155 Ohio St. 293, 302, 98 N.E.2d 815, 820 (1951).

¹⁰⁸ *Zimmerman v. Bank of America*, 12 Cal. Rptr. 319, 320, 191 Cal. App. 2d 55, 57 (Dist. Ct. App. 1961); *Johnson v. People*, 202 Ill. 306, 66 N.E. 1081 (1903).

¹⁰⁹ *Lexington v. Davis*, 310 Ky. 751, 221 S.W.2d 659 (1949).

¹¹⁰ *Blum v. Board of Zoning*, 1 Misc. 2d 668, 149 N.Y.S.2d 5 (App. Div. 1956).

¹¹¹ *Hamrick v. Albertville*, 219 Ala. 465, 474, 122 So. 448, 456 (1929).

¹¹² *Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974).

¹¹³ *Id.* at 477.

¹¹⁴ OHIO REV. CODE ANN. § 121.22(G)(2) (Page Supp. 1976).

¹¹⁵ *See Schneider v. Greater M. & S. Circuit*, 144 Misc. 534, 259 N.Y.S. 319 (App. Div. 1932).

¹¹⁶ *See Sturm v. Sturm*, 11 N.J. Eq. 579, 163 A. 5 (Ch. 1932).

¹¹⁷ *Lincoln Tavern v. Snader*, 165 Ohio St. 61, 133 N.E.2d 606 (1956); *Boyle v. Public Adjustment & Constr. Co.*, 87 Ohio App. 264, 93 N.E.2d 795 (Ct. App. 1950).

tion is proper, and some irregularity or mistake occurs, the judgment is not void but merely voidable.¹¹⁸ None of the provisions contained in the open meeting statute is expressly directed to the jurisdiction of a public body; nor do the enabling statutes of public bodies expressly or implicitly provide that the power of a body is contingent upon its full compliance with the open meeting statute. Since public bodies have the inherent power to meet and conduct public business, a statute providing for the manner in which such business is to be conducted cannot be considered jurisdictional in nature.

In addition, the view that action taken in a closed meeting is void *ab initio* poses formidable practical problems. The provision calling for invalidation is mandatory once it is determined that action was taken in a meeting closed to the public. A court is afforded no opportunity to consider the exigencies of a particular situation. The hardship to those who detrimentally rely upon official action subsequently voided is readily apparent, and is aggravated by the fact that the statute contains no time limitation upon an action to challenge the validity of an official act. It is possible, therefore, that action taken in an illegally closed meeting could be relied upon for several years before being declared void by a court.

This interpretation seems particularly untoward in light of the fact that various judicial doctrines have been developed in other contexts to protect the public under similar circumstances. For instance, it is clear that the acts of a *de facto* officer¹¹⁹ are valid, insofar as they involve the interests of the public and of third persons, until his title to the office is adjudged insufficient.¹²⁰ The rule was developed as a matter of necessity to protect the interests of the public and individuals relying on the official acts of persons exercising the duties of an officer, because it would be unreasonable to require the public to inquire on all occasions into the title of an officer, or compel him to show title.¹²¹

If the term "invalid" is interpreted to mean void, members of the public would have to determine whether or not a particular body had acted in compliance with the open meeting law. They would, in effect, have to rely upon the official actions of a public body at their own risk. This interpretation will operate to the obvious detriment of

¹¹⁸ *Tipton v. Alvis*, 87 Ohio App. 463, 92 N.E.2d 696 (Ct. App. 1949).

¹¹⁹ "A *de facto* officer has been defined as one who, although not an officer in point of law, has the reputation of being the officer he assumes to be and is accepted as such by those who deal with him." *State ex rel. Witten v. Ferguson*, 148 Ohio St. 702, 708, 76 N.E.2d 886, 890 (1947).

¹²⁰ See *Stiess v. State*, 103 Ohio St. 33, 132 N.E. 85 (1921).

¹²¹ See *Sawyer v. State*, 94 Fla. 60, 113 So. 736 (1927).

the public and is not justified by the policies served by enforcement of the open meeting law.

V. CONCLUSION

The considerations that give rise to the enactment of open meeting legislation are irrefutably sound, but many of the statutes are drafted in a regrettable manner. The Ohio statute is seriously flawed in that it fails to clearly define the public right of access and the corresponding duties of public officials. Uncertainties that arise over the basic issue of coverage are so fundamental and intractable that their final resolution will undoubtedly require legislative revision. A clear understanding of what is meant by the term public body is basic to the effective operation of the statute; yet the language of the statute offers little indication of what is comprehended within the term. The statute is, therefore, open to interpretation and misapplication by the public, government officials, and the courts.

Such ambiguities pose the greatest hardship to public officials. Far from being a trap only for the unwary, the statute poses a formidable problem to the most astutely circumspect public officials. The difficulties raised by the statute's ambiguities are accentuated by the harshness of the penalty for noncompliance, which is itself a subject of considerable uncertainty.

The statute has undeniably provided members of the public with a broad, if often controvertible right to observe the operation of state government. However, it has also provided a source of confusion for well-meaning public officials. It can only be hoped that the General Assembly will soon attempt to resolve these difficulties.